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No. 80-1121

IN THE

Supreme Court of the United States

October Term 1980

UNITED STATES OF AMERICA
Petitioner

v.

JOSEPH J. CLARK, *et al.*
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the opinion of the United States Court of Claims correct in applying the provisions of 5 U.S.C. 5334(b) [which provide for a two-step increase upon promotion] to the promotions of respondents from Wage Board positions to positions in the General Schedule.

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BRIEF FOR JOSEPH J. CLARK, et al. IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 1a-8a) is reported at 599 F.2d 411.

JURISDICTION

The judgment of the United States Court of Claims was entered on May 16, 1979, and a Petition for Rehearing was denied on September 28, 1979 (Pet. App. 15a-16a). The Petition for a Writ of Certiorari was filed on January 5,

1981. The Jurisdiction of this Court is invoked under 28 U.S.C. 1255.

STATUTE AND REGULATION INVOLVED

1. 5 U.S.C. 5334(b) provides in pertinent part:

> "(b) An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two-step increases of the grade from which he is promoted or transferred . . ."

2. 5 C.F.R. 531.202(h) provides:

> "(h) Promotion means a change of an employee, while continuously employed, from: (1) one General Schedule grade to a higher General Schedule grade; or (2) a lower rate paid under authority other than Subchapter III of Chapter 53 of Title 5, United States Code, to a higher rate within a General Schedule grade."

STATEMENT OF THE CASE

The case involves the proper pay slotting of respondents upon promotion from the Wage Board to General Schedule positions. Wage Board employees are skilled and semi-skilled "blue collar" workers. The pay rate of Wage Board employees is on an hourly basis in accordance with the prevailing wage in the local area according to the Coordinated Federal Wage System (Federal Personnel Manual, Chapter 532). The General Schedule, on the other hand, is a separate wage system whereunder salaries are uniform nationwide. General Schedule salary rates are adjusted according to the Federal Pay Comparability Act of 1970, 5 U.S.C. 5301, *et. seq.*

Each of the respondents was permanently promoted on various dates from August, 1973 through October, 1974 from a Wage Board position with an hourly rate salary to a General Schedule position with a per annum salary rate. Each respondent was promoted following application, selection, and appointment under the Department of the Navy Merit Promotion Program.

At the time of the effective date of promotion for respondent, Nicholas J. Libretto, his salary slotting in his General Schedule position was computed based on his highest previous rate in the Wage Board rate structure. The remaining five respondents had their new salary rates computed on the basis of a two-step increase at the time of promotion.

In November, 1974, respondent, Nicholas J. Libretto, filed an appeal with the Civilian Personnel Office of the Navy regarding his pay slotting after his promotion to the General Schedule. The Civilian Personnel Office of the Navy advised Mr. Libretto that since the method of salary slotting used in his case resulted in a discrepancy between his rate of pay upon promotion and that of the other similarly situated respondents that a formal written decision would be sought from the Office of Civilian Manpower Management, Department of the Navy. On March 19, 1975, the Director of Civilian Manpower Management, Department of the Navy, affirmed the salary slotting accorded respondent Libretto, and announced that the salary slotting of the other respondents had been incorrectly set and would thereafter be adjusted downward in accordance with the salary slotting procedures applied to respondent Libretto.

After exhausting their administrative remedies, respondents petitioned the United States Court of Claims

to correct their salary slotting after promotion from the Wage Board to General Schedule positions in order to reflect a two-step increase upon promotion. Following full briefing and oral argument of Cross Motions for Summary Judgment, the Court of Claims found for respondents, holding:

> ". . . that 5 U.S.C. 5334(b) requires that a GS (General Schedule) employee who has been promoted from the WS (Wage System) is entitled to two-step increases." (explanation supplied).

The decision of the United States Court of Claims below turned on the meaning of 5 U.S.C. 5334 and various regulations contained in 5 CFR, Part 531. The Court of Claims found that it was undisputed that respondents received a promotion. The Court of Claims reviewed legislative history of 5 U.S.C. 5334 and concluded that Congress intended that a promotion meant additional compensation of at least a certain amount. The Court then noted that applying the "highest previous rate" pay slotting upon promotion, as urged by the government, would in some instances leave a promoted employee with *no* additional pay. After careful consideration of all the parties' submissions and oral argument, the Court of Claims granted respondents' Motion for Summary Judgment and ordered that respondents should receive back salary for improper pay slotting.

By motion dated June 19, 1979, petitioner moved for a Rehearing *En Banc* of the May 16, 1979 decision of the Court of Claims. By order dated September 28, 1979, the Court of Claims denied petitioner's Motion for Rehearing *En Banc*.

Although respondents' Motion for Call Upon the General Accounting Office to calculate their back salary

entitlement was allowed November 7, 1979, the report of such back salary entitlement was not filed in the Court of Claims until June 13, 1980. Respondents' back salary entitlement was calculated for the period from the effective date of the then promotion in issue to May 17, 1980.

REASONS FOR DENYING THE PETITION

Petitioner contends that the United States Court of Claims has misinterpreted or misapplied the provisions of 5 U.S.C. 5334(b), and that such alleged error will impose substantial monetary liability on the United States. The arguments advanced by petitioner in support of its petition are the same arguments made to the Court of Claims and rejected by the Court in its decision below. Petitioner is simply seeking another hearing of its same arguments, a purpose for which the Writ of Certiorari is not applicable. *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923).

For purposes of review of the findings of the Court of Claims, such findings are treated like the "verdict of a jury and this Court is not at liberty to refer to the evidence any more than to the opinion for the purpose of eking out, controlling, or modifying their scope". *United States* v. *Esnault Pelteric*, 303 U.S. 26, 29 (1938); *United States* v. *Causby*, 328 U.S. 256, 268 (1946); and *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 758 (1976).

1. Petitioner Has Not Demonstrated a Substantial Federal Question.

The Petition for Writ of Certiorari should be denied. The question involved is not one of peculiar gravity and general importance. *Fields* v. *United States*, 205 U.S. 292, 296 (1907); *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S.

251, 258 (1916); *Brown* v. *Allen*, 344 U.S. 443, 447 (1953). Petitioner has failed to provide any substantiation whatsoever for its contention that the Court of Claims decision will impose a substantial monetary liability on the United States. The Petition is simply speculative as to any back pay claims which may be initiated by the decision below.

In support of its petition, petitioner has merely presented estimates of the number of claims before the General Accounting Office without any corroboration whatsoever that such claims are valid or are based on the decision of the Court of Claims below.

The number of claims which petitioner alleges will result from the decision below includes claims which are based on promotions which took place over six years ago.

Petitioner appears to argue that employees may have a claim for back salary in instances of promotion occurring many years ago. Such claim would be an exception to the six year limitation period of the United States Court of Claims. 28 U.S.C. 2501. This is the first recognition by the government, of which counsel is aware, that there is a continuing claim exception to the Statute of Limitations for promotions which occurred six years prior to filing suit. Petitioner appears to be raising exaggerated concerns over the ramifications of the decision of the Court of Claims below on the operation and expenses of the United States government.

Petitioner's estimate of the recovery of back salary by the six respondents fails to note that the amount of recovery was increased as a result of the one year delay from the Court's decision to the rendition of a money judgment. This delay was occasioned by the length of time spent by the General Accounting Office and the Office of Personnel Management in calculating respondents' back

salary entitlement. Petitioner's liability in the instant matter would have been considerably reduced by prompt response to respondents' Motion for Call.

Petitioner cannot estimate potential monetary liability arising from the decision below by projecting the back salary recovery of respondents, unless it can be assumed that the delay in processing future claims will be comparable to the one year delay in calculating respondents' back salary entitlement after the decision below. The Supreme Court does not "sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants". *Rice* v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955).

As petitioner pointed out in its brief, under the provisions of the Tucker Act, 28 U.S.C. 1346, 1491, suits involving pay slotting claims, pursuant to 5 U.S.C. 5334, are exclusively within the jurisdiction of the United States Court of Claims. There is, therefore, no conflict of opinion between the Circuit Courts of Appeal or lower courts and the Court of Claims on the question here.

Petitioner has not demonstrated that there is any conflict of opinion between the lower courts or that there is a substantial federal question beyond petitioner's speculations. Petitioner is merely dissatisfied with the decision of the Court of Claims below and seeks another hearing of its arguments.

2. The Decision Below is Correct

The decision of the Court of Claims below is correct. Petitioner raises questions of the competence of the Court in deciding this matter of civilian pay and proper pay slotting upon promotion. This issue of proper pay slotting is

one which the Court of Claims is uniquely qualified to decide.

As the Court of Claims noted in its opinion below, the issue is not whether respondents were promoted. The promotion of respondents was an accomplished fact. This case is not a matter of an employee requesting a promotion. No discretion of the Court is required. The issue is proper pay salary slotting upon promotion. *Kellerman* v. *United States,* 504 F.2d 1128, 1132, 205 Ct. Cl. 484, 490 (1974); *Nordstrom* v. *United States,* 177 Ct. Cl. 818 (1966). Each of the respondents was seeking an automatic pay adjustment following the promotion process.

Petitioner's brief reargues the same points advanced before the Court of Claims and rejected. Petitioner contends that the proper pay slotting upon promotion from the Wage Board to a General Schedule position is determined by applying the "highest previous rate". The so-called "highest previous rate" rule advanced by petitioner as applicable to the instant matter, is nothing more than a mere conversion from one salary rate to another. According to the highest previous rate rule a higher pay rate after "promotion" might occur, but only when employees' Wage Board salary fell between two General Schedule rates (steps). In practice, the highest previous rate pay slotting urged by petitioner as appropriate here would result in only a few cents per hour increase in pay for these respondents, after they were promoted from Wage Board to General Schedule positions. And, some of the respondents were actually promoted from non-supervisory to supervisory positions.

In support of its position, petitioner has argued that the highest previous rate has been the "longstanding and consistent interpretation of the statute by the agencies respon-

sible for its administration". Such argument is refuted by the facts of the case. As the Court of Claims noted in its opinion below:

> "Just how incredibly confusing the regulations were is certainly obvious, since the government paid five claimants, then changed its mind, then refused to pay another, reneged on the five, counterclaimed for a refund, and finally moved to dismiss on its own counterclaim." (Pet. App. 5a, note 7).

Clearly, uniformity in administrative processing was the exception rather than the rule.

As to the decisions of the Comptroller General, the Court is not bound by the view of the Comptroller General, since such decisions do not operate as a legal or judicial determination of the rights of the parties. *Burroughs Corporation* v. *United States,* Ct. Cl. No. 251-78 (March 19, 1980), Slip Op. at page 8.

Administrative construction of a statute can prevail only if such construction is reasonable. *Robinson* v. *Lundrigan,* 227 U.S. 173, 178 (1973). The Courts are not obligated to stand aside and rubberstamp affirmance of the administrative decisions which they deem inconsistent with a statutory mandate or which frustrate the congressional policy underlying a statute. *Federal Maritime Commission* v. *Seatrain Lines, Inc.,* 411 U.S. 726, 745 (1973). The principal of according deference to administrative practice normally applies only where the relevant statutory language is unclear or susceptible to differing interpretations. *Shea* v. *Vialpando,* 416 U.S. 251, 262, note 11 (1974).

The statute in question is clear on its face and provides that a "promotion" entitles respondents to a two-step in-

crease [5 U.S.C. 5334(b)]. It is equally clear and undisputed that respondents have been "promoted". In its decision, the Court of Claims followed the plain meaning of 5 U.S.C. 5334(b), and held that respondents are entitled to a two-step increase upon promotion. *Allstate Insurance Co.* v. *United States,* 550 F.2d 629, 213 Ct. Cl. 96 (1977). Where regulations are inconsistent with the statute, such regulations cannot, to that extent, stand. *Farrell Lines, Inc.* v. *United States,* 499 F.2d 587, 204 Ct. Cl. 482 (1974). The regulations cited by petitioner are inconsistent with the statute [5 U.S.C. 5334(b)] and are not dispositive of the matter in issue.

In support of its petition, petitioner argues that Congress intended that 5 U.S.C. 5334(b) was only to provide for a two-step increase for a promotion from one General Schedule position to another General Schedule position. The statements of Congressmen and others testifying at House hearings, as cited by petitioner, do not provide support for petitioner's position. It is clear that Congress did not intend 5 U.S.C. 5334(b) to apply to promotions from one Wage Board position to another Wage Board position. There is, however, no indication whatsoever that Congress intended to exclude promotions from the Wage Board to a General Schedule position from the operation of 5 U.S.C. 5334(b), as petitioner suggests.

In any event, where the statute is plain on its face, such as here, statements in committee reports are not to be considered in interpretation of the statute. *United States* v. *Missouri P.R. Co.,* 278 U.S. 269, 278 (1929).

Petitioner's argument that the term "grade", as such term appears in 5 U.S.C. 5334(b), applies only to General Schedule grades is specious. The statutes and regulations relating to the pay setting of Wage Board positions refers to

"grades" within the Wage Board. Chapter 532 of the Federal Personnel Manual provides regulations for the pay of employees in the Federal Wage System. The term "grade" is used throughout Chapter 532.

The legislative history of 5 U.S.C. 5334(b) does not support petitioner's position that a two-step increase is available only for promotions within the General Schedule. The argument of petitioner fails to address the issue of promotion between wage systems. The 1972 legislation which was to codify and standardize the prevailing rate system was not, as petitioner argues in its brief, an express approval of the pay slotting procedure which petitioner argues.

In 1972, Congress enacted legislation to establish into law the long established principles and policies for setting the pay of prevailing rate employees. Public Law No. 92-392, 86 Stat. 564, was enacted to codify the procedures by which the wages of Wage Board employees were established, monitored and adjusted. Nothing in the legislative history suggests that Congress, in its consideration of Public Law No. 92-392, expressly approved any pay slotting procedure of applying the highest previous rate, which is urged here by petitioner for promotions from Wage Board to General Schedule positions.

The pay slotting procedures of the "highest previous rate" calculation urged by petitioner would be to slot the employee in a General Schedule grade that does not exceed the employee's highest previous rate in the Wage Board. If the employee's previous Wage Board salary falls between two General Schedule pay rates (steps) of the grade to which the employee is assigned, the employee may receive the higher pay rate upon promotion. Thus, the amount of any increase in pay upon promotion would depend on the

disparity between two General Schedule steps. The employee, therefore, could conceivably receive, under petitioner's theory, a minimum of no increase in pay upon promotion and a maximum increase in pay upon promotion of less than a one-step increase. This is the same position which the Court of Claims rejected because it would "in some instances, leave a promoted employee with no additional pay."

At various times, petitioner has argued that the proper pay slotting of employees, pursuant to a promotion, is a two-step increase, one-step increase, and no step increase (highest previous rate). Throughout this case, petitioner has confused this action of *promotion* of an employee with the personnel action of *converting* a position from the Wage Board to the General Schedule. In such situation, as conversion to another pay system, the highest previous rate calculation urged by petitioner may be proper. There, the *position* is converted and the incumbent in the position merely moves with the position and changes pay systems. In the instant matter, however, respondents were *promoted* to different positions in different pay schedules. Their promotions were granted on the basis of merit. Proper slotting to reflect the promotion (and salary increase) had to follow. Pursuant to the plain language of 5 U.S.C. 5334(b), respondents were entitled to a two-step increase upon promotion.

It is well settled that the interpretation of a statute which effectuates rather than frustrates the purpose of the legislation must be heeded. *Shapiro* v. *United States,* 335 U.S. 1, 31 (1948). As the Court of Claims observed in its opinion below, in enacting 5 U.S.C. 5334(b) Congress intended to compensate employees promoted from one position to another for the increase in duties and responsibility. At one point. a one step, and then later a two step, in-

crease in salary was considered by Congress as appropriate recompense for the increased duties and responsibility which a promotion brought. The interpretation of 5 U.S.C. 5334(b) urged by petitioner is that employees promoted from Wage Board positions to positions of greater responsibility in the General Schedule will not be so recompensed.

Petitioner stipulates in its brief that employees promoted *within* the Wage Board or employees promoted from the General Schedule to the Wage Board receive an increase in salary upon promotion of at least one step (Pet. p. 9, note 8). But we are concerned here with promotions from the Wage Board to the General Schedule. Petitioner's argument might conceptually provide no increase in salary upon promotion when the employer's Wage Board salary was equal to the salary of his new General Schedule position. Petitioner's position is inconsistent and not in keeping with the statute and its intent.

The decision of the Court of Claims is correct. Petitioner has not demonstrated in its Petition for Writ of Certiorari that the decision of the Court of Claims below is incorrect or that a substantial federal question is in issue. Petitioner is merely dissatisfied with the decision of the Court of Claims below and is attempting through the Petition for Writ of Certiorari to obtain another hearing of its arguments.

CONCLUSION

It is therefore respectfully submitted that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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